

independently owned and independently controlled. (*Wirtz v. Lunsford*, 404 F. 2d 693 (C.A. 6).) At the hearing before the Senate Labor Subcommittee, when the amendment was proposed which eventually was incorporated in the Act as section 13(b)(10) by the 1961 amendments (later repealed by the 1966 amendments to the Act and replaced by section 7(b)(3)), a spokesman for proponents of the amendment made the following statement, which bears on this requirement for exemption:

The designation "independent" as applied to an oil jobber means that he owns his own office, bulk storage, and delivery facilities; pays his own personnel, and in all respects conducts his business as any other independent businessman.

It also means that the jobber is not a subsidiary of nor controlled by any so-called major oil company, although the jobber may sell the branded products of such a company.

Some jobbers own service stations which they lease to independent dealers and a small percentage of jobbers may operate one or more service stations with their own salaried personnel. (Senate Hearings on the Amendments to the Fair Labor Standards Act, 87th Cong., first session, p. 411.)

It appears, therefore, that the purpose of the requirement limiting the exemption to the enterprises which are "independently owned and controlled," is to confine the exemption to those petroleum jobbers who own their own facilities and equipment and who are not subsidiaries nor controlled by any producer, refinery, terminal supplier or so-called major oil company. (See *Wirtz v. Lunsford*, cited above.) The fact that the petroleum jobber sells a branded product of a major oil company will not, of itself, affect the status of his enterprise as one which is "independently owned and controlled". So also the fact that the jobber owns gasoline service stations, which he leases or which he operates himself, will not affect the status of his enterprise as being "independently owned and controlled".

#### § 794.115 "Independently owned."

Ownership of the enterprise may be vested in an individual petroleum jobber, or a partnership, or a corporation, so long as such ownership is not shared by a major oil company, or other producer, refiner, distributor or supplier of

petroleum products, so as to affect the independent ownership of the enterprise. As noted in § 794.114, an enterprise will not be considered independently owned where it does not own its own office, bulk storage, and delivery facilities. The enterprise may also not be considered "independently owned" where it does not own its stock-in-trade. (See *Wirtz v. Lunsford*, 404 F.2d 693 (C.A. 6).) It is recognized that, in the ordinary course of business dealings, an independently owned enterprise may purchase its goods on credit and this, of course, will not affect its characterization as being "independently owned" within the meaning of the exemption. However, there may well be a question as to whether the enterprise is "independently owned" where the enterprise receives its petroleum products on consignment and the supplier lays claim to the ownership of the account receivable. Of possible relevance also is the intent evident in the statutory language to provide exemption only for an enterprise which can meet the specified tests which depend on "the sales of such enterprise." The determination in such cases, as in other cases involving questions of independent ownership, will necessarily depend on all the facts.

#### § 794.116 "Independently \* \* \* controlled."

As explained in § 794.114, the enterprise in addition to being independently owned must also be "independently controlled." The test here is whether the individual, partnership, or corporation which owns the enterprise also controls the enterprise as an independent businessman, free of control by any so-called major oil company or other person engaged in the petroleum business. Control by others may be evidenced by ownership; but control may exist in the absence of any ownership. For example where an enterprise engaged in the wholesale or bulk distribution of petroleum products enters into franchise or other arrangements which have the effect of restricting the products it distributes, the prices it may charge, or otherwise controlling the activities of the enterprise in those

respects which are the common attributes of an independent businessman, these facts may establish that the enterprise is not "independently controlled" as required by the exemption under section 7(b)(3). (*Wirtz v. Lunsford*, 404 F. 2d 693 (C.A. 6).)

**§ 794.117 Effect of franchises and other arrangements.**

Whether a franchise or other contractual arrangement affects the status of the enterprise as "an independently owned and controlled \* \* \* enterprise," depends upon all the facts including the terms of the agreements and arrangements between the parties as well as the other relationships that have been established. The term "franchise" is not susceptible of precise definition. While it is clear that in every franchise a business surrenders some rights, it is equally clear that every franchise does not necessarily deprive an enterprise of its character as an independently owned and operated business. This matter was the subject of legislative consideration in connection with other provisions of the 1961 amendments to the Act. The Senate Report on the amendments, in discussing the effects of franchises and similar arrangements on the scope of the "enterprise" under section 3(r) of the Act, stated as follows:

There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer to the question, "Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?"

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In all of these cases if it is found on the basis of all the facts and circumstances that the arrangements are so restrictive as to products, prices, profits, or management as to deny the "franchised" establishment the essential prerogative of the ordinary independent businessman, the establishment, the dealer, or concessionaire will be considered an integral part of the related activities of the enterprise which grants the franchise, rights or concession. (S. Rep. 145, 87th Cong., first session, p. 42.)

Thus there may be a number of different types of arrangements established in such cases and the determination as to whether the arrangements have the effect of depriving the enterprise of its independent ownership or control will necessarily depend on all the facts. The fact that the distributor hires and controls the employees engaged in distribution of the product does not establish the requisite independence of the distributor; it is only one factor to be considered (*Wirtz v. Lunsford*, 404 F. 2d 693 (C.A. 6).) Ultimately the determination of the precise scope of such arrangements and their effect upon the independent ownership and control of the enterprise under section 7(b)(3), as well as on the question whether such arrangements result in creating a larger enterprise, rests with the courts.

**§ 794.118 Effect of unrelated activities.**

The term "independently owned and controlled" has reference to independence of ownership and control by others. Accordingly, the fact that the petroleum jobber may himself engage in other businesses which are not related to the enterprise engaged in the wholesale or bulk distribution of petroleum products, will not affect the question whether the petroleum enterprise is independently owned or controlled. For example, the fact that the wholesale or bulk petroleum distributor also owns or controls a wholly separate tourist lodge enterprise or job printing business will not affect the status of his enterprise engaged in the wholesale or bulk distribution of petroleum products as an "independently controlled" enterprise.

**ANNUAL GROSS VOLUME OF SALES**

**§ 794.119 Dependence of exemption on sales volume of the enterprise.**

It is a requirement of the section 7(b)(3) exemption that the annual gross volume of sales of the enterprise must be less than \$1 million exclusive of excise taxes. This dollar volume test is separate and distinct from the \$250,000 annual gross volume (of sales made or business done) test in section 3(s)(1) of